



November 10, 1999

Mr. David A. Smith
Senior Assistant City Attorney
P.O. Box 1758
Victoria, Texas 77902-1758

OR99-3189

Dear Mr. Smith:

You have asked whether certain information is subject to required public disclosure under the Public Information Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 128715.

The City of Victoria Police Department (the "department") received a request for "[p]ast three years of (Billy) William Wade Ford III, DOB: March 1, 1980 requesting criminal records. Need police report of most recent charge." In response to the request, you submit to this office for review the responsive information. You assert that the requested information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

At the outset we note that although you have not raised section 552.101 as an applicable exception, based on the records at issue, we must consider whether some of the submitted information should be excepted from required public disclosure under this exception.¹ Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses both common-law and constitutional privacy, as well as information protected by other statutes. The compilation of all offense reports of a named individual, even for a restricted period of time, constitutes a criminal history record of that individual. Criminal history information ("CHRI") may be withheld from required public disclosure under common-law privacy if it meets the criteria articulated for section 552.101 of the Government Code by the Texas Supreme Court in *Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In *United States Department of Justice v. Reporters Committee For Freedom of the Press*, 489 U.S. 749 (1989), the United States Supreme Court concluded that where an individual's CHRI is compiled or summarized by a governmental entity, the information takes on a character that implicates the individual's

¹The Office of the Attorney General will raise section 552.101 on behalf of a governmental body when necessary to protect third-party interest. See generally Open Records Decisions Nos. 481 (1987), 480 (1987), 470 (1987).

right of privacy in a manner that the same individual records in an uncompiled state do not. Based on *Reporters Committee*, this office has concluded that a request for all law enforcement records of a specified individual implicates the individual's common-law privacy rights to the extent that the individual is identified as a suspect, and the responsive information is excepted from disclosure under section 552.101.

Additionally, to the extent the requested records may contain CHRI, we must note that the privacy interest in CHRI has also been recognized by federal regulations which limit access to criminal history record information that states obtain from the federal government or other states.² See 28 C.F.R. § 20; see also *Reporters Comm.*, 489 U.S. 749 (1989) (finding criminal history information protected from disclosure under Freedom of Information Act, 5 U.S.C. § 552, and Privacy Act of 1974, 5 U.S.C. § 552a). Thus, if any of the information was generated by the Texas Crime Information Center ("TCIC") or the National Crime Information Center ("NCIC"), the information must not be made available to the requestor except in accordance with federal regulations. See Open Records Decision No. 565 (1990). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; see also *id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Therefore, any CHRI that falls within the ambit of these state and federal regulations must be withheld from the requestor. We have marked a representative sample of the information that you must withhold under section 552.101.

We next consider whether any of the remaining information may withheld under the claimed exceptions. Section 552.103(a), the "litigation exception" excepts from disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records

²Section 552.101 encompasses information protected by other statutes.

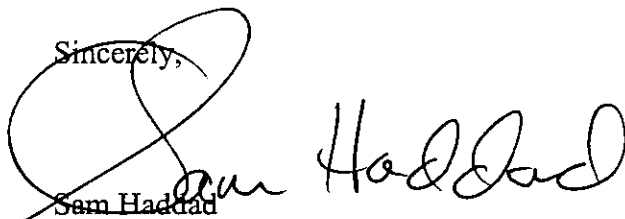
Decision No. 551 at 4 (1990). The department must meet both prongs of this test for information to be excepted under section 552.103(a). Section 552.103 requires concrete evidence that litigation may ensue. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

In this instance, you have supplied to this office records showing that a "Deadly Conduct" charge is pending against the subject of this request. In support of the section 552.103 claim, you state that the litigation exception is applicable in this instance because there is "pending criminal litigation." Based on your arguments and the submitted records, we conclude that litigation is pending or reasonably anticipated. We also conclude that the documents submitted by the department are related to the litigation for the purposes of section 552.103(a). Therefore, the information at issue may be withheld pursuant to section 552.103(a).

Generally, however, once information has been obtained by all parties to the litigation, either through discovery or otherwise, no section 552.103 interest exists with respect to that information.³ Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We are resolving this matter with an informal letter ruling rather than with a published open records decision.⁴ This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in black ink, appearing to read "Sam Haddad", is written over the word "Sincerely," and the printed name "Sam Haddad".

Sam Haddad
Assistant Attorney General
Open Records Division

SH/nc

³Basic information in an offense report generally may not be withheld under either section 552.103 or section 552.108. See Gov't Code § 552.108(c); cf. Open Records Decision No. 597 (1991).

⁴As we resolve your request under sections 552.101 and 552.103, we need not address your section 552.108 arguments.

Ref.: ID# 128715

encl. Submitted documents

cc: Ms. Debra Henry
2116 South Elm
Little Rock, Arkansas
(w/o enclosures)